92-866

Supreme Court, U.S.
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CASE #_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

(CHARLES WILLIAM O'BRIEN),

F & S PROPERTIES,
WKH CORPORATION,
HWK CORPORATION
HKW PROPERTIES
JASPER INVESTMENT CORPORATION,
Petitioners,

v.

BANK ONE, COLUMBUS, N.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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September, 1992

QUESTIONS PRESENTED FOR REVIEW

Whether a timely filed Brief is properly stricken by a reviewing Court on the basis of opposing counsel's allegations of not having received his copy via ordinary mail in a timely fashion.

THE PARTIES

The parties are Petitioner, Charles William O'Brien; and Freedom Savings Association, F.A., Lyndon Guaranty Bank and Merit Savings Association.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

THE PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT.....4

CONCLUSION.....5

CERTIFICATE OF SERVICE.....7

APPENDICES

Entry of Supreme Court of Ohio.....A-1

Journal Entry of Dismissal of the Court of Appeals.....A-2

TABLE OF AUTHORITIES

CASES

Perry v. Perry, 455 N.E. 2d 689, 7 Ohio App. 3d 318, 7 O.B.R. 413.....5

UNITED STATES STATUTES

28 U.S.C., Section 1257(3) and 2101(c).....2

UNITED STATES CONSTITUTION

Fifth and Fourteenth Amendments to the United States Constitution.....2,6

OPINIONS BELOW

The prior opinion most pertinent to this Petition and the judgment under review is the December 9, 1991 Journal Entry of Dismissal by the Tenth District Court of Appeals of Franklin County, Ohio: Bank One, Columbus, N.A. vs. Charles William O'Brien, et al., Appellate case 91AP-821 and 91AP-920 (unreported). The decision under review and the order denying review are reproduced in the Appendix to this Petition.

JURISDICTION

The Entry of the Ohio State Supreme Court was journalized on May 27, 1992. This Petition was filed within 90 days of May 27, 1992, including the extension. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257(3) and 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves the Due Process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

STATEMENT OF THE CASE

The original case was filed by Bank One, Columbus, N.A. on March 17, 1989, as an action on three (3) Cognovit Notes. When these three (3) judgments were set aside, Bank One filed its First Amended Complaint, adding new claims and new parties. A Second Amended Complaint was filed, Cross-claims were filed and after time, judgments and summary judgments by default were granted by the Trial Court. Petitioner Charles William O'Brien filed timely notices of

appeal, and, in one case, the decision of the Trial Court has been reversed and in another, partially reversed.

On October 16, 1991, Petitioner Charles William O'Brien filed his Brief and a corrected Brief on October 23, 1991 with the Tenth District Court of Appeals of Franklin County, Ohio. Thereafter, on November 5, 1991, Merit Savings Association and Lyndon Guaranty Bank filed Motions to Strike Petitioner Charles William O'Brien's Brief alleging that they had not been served copies of the time-stamped Brief of Petitioner Charles William O'Brien.

Thereafter, at the instructions of the Administrator of the Court of Appeals, Petitioner Charles William O'Brien filed a Supplement to his Motion to File Defendant-Appellant's Brief Instanter and Memorandum Contra Motion(s) to Strike, and further supplemented service of the Brief by telefax. On November 14, 1991, Merit Savings Association and Lyndon Guaranty Bank filed their Briefs.

On November 15, 1991, Freedom Savings Association,

F.A., filed a Motion to Strike Petitioner Charles William O'Brien's Brief for the exact same reasons as Lyndon Guaranty Bank and Merit Savings Association. Thereafter, pursuant to instructions from the Court Administrator, Petitioner Charles William O'Brien telefaxed a copy of the Brief to counsel for Freedom Federal Savings Association, F.A.

Thereafter, on November 22, 1991, counsel for Freedom Federal Savings Association, F.A. sent Petitioner Charles William O'Brien a letter indicating that he received the copy of the Brief.

On December 9, 1991, the Court of Appeals struck Petitioner Charles William O'Brien's Brief, said Journal Entry of Dismissal being the subject of this Petition.

REASONS FOR GRANTING THE WRIT

The Tenth District Court of Appeals of Ohio simply denied Petitioner Charles William O'Brien's rights to due process and fair and equal access to the review process for no

other reason than Petitioner Charles William O'Brien represented himself. The Appendix indicates that there was ample evidence of service by ordinary mail and later, re-service by telefax which was supplemented of record. It is ludicrous to believe that the Tenth District Court of Appeals of Ohio acted in a manner to preserve Petitioner's Appeal on the merits.

Ohio law is clear on this point. Where there was no apparent prejudice to appellee resulting from undue delay of appellant's failure to file timely brief, interest of determining appeals upon merits justified granting of appellant's motion to file brief instanter out of rule, so long as all costs of action date were assessed against him, regardless of outcome of appeal on merits, Perry v. Perry, 455 N.E. 2d 689, 7 Ohio App. 3d 318, 7 O.B.R. 413.

CONCLUSION

Petitioner Charles William O'Brien timely filed his Brief with the Tenth District Court of Appeals of Ohio and certified

that copies of the Brief were mailed to opposing counsel. When a mailing issue was brought up, Petitioner Charles William O'Brien telefaxed the entire Brief and filed supplemental evidence of service. The action by the Appellate Court in striking Petitioner Charles William O'Brien's Brief improperly denied Petitioner Charles William O'Brien his day in Court and thereby challenges Petitioner Charles William O'Brien's Fifth and Fourteenth Amendment Due Process rights. To this end, the Tenth District Appellate Court of Ohio and the Supreme Court of Ohio's refusal to review this issue should be reversed and remanded with instructions to hear the Brief on the merits.

Respectfully submitted,

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THE SUPREME COURT OF OHIO

1992 TERM

To wit: May 27, 1992

Bank One, Columbus, N.A., Appellee,	:	Case No. 92-307
v.	:	
Charles William O'Brien et al., Appellants.	:	E N T R Y

This cause is pending before the Court on the filing of a motion for an order directing the Court of Appeals for Franklin County to certify its record. Upon consideration of appellee's motion to dismiss and appellants' motion to consolidate the above-styled cause with Supreme Court Case No. 92-439, Bank One, Columbus, N.A. v. O'Brien,

IT IS ORDERED by the Court that said motion to dismiss be, and the same is hereby, sustained.

IT IS FURTHER ORDERED by the Court that this cause be, and the same is hereby, dismissed.

IT IS FURTHER ORDERED by the Court that said motion to consolidate be, and the same is hereby, overruled.

COSTS:

Motion Fee, $40.00, paid by Charles W. O'Brien.

(Court of Appeals Nos. 91AP821 & 91AP920)

THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bank One, Columbus, N.A., :

: Nos. 91AP-821
Plaintiff-Appellee, and
: 91AP-920

v.

: (REGULAR CALENDAR)

Charles William O'Brien, et al., :

: DATED: December 9, 1991
Defendants-Appellants.

JOURNAL ENTRY OF DISMISSAL

Appellees' motion for leave to strike the brief of appellant Charles William O'Brien for failure of appellant to serve his brief on appellees is granted, the affidavit of counsel for appellees indicating that no brief was received by counsel. Appellant has filed a response in which he states that his brief was filed on October 16, 1991, and that his secretary mailed the brief to counsel for appellees on October 15, 1991. Appellant also indicates that a copy of the brief was telefaxed to counsel on November 14, 1991. The affidavit of appellant's secretary not indicating when the brief was mailed, and

containing appendices which show inconsistent postmarks as evidence of mailing, appellees' motions to strike the brief of appellant are granted and the court clerk is ordered to strike the brief of appellant from the file. Since appellant has not served a brief timely, this appeal is sua sponte dismissed.

Judge Alba L. Whiteside

Judge John W. McCormac

Judge Peggy Bryant

cc: Michael W. Donaldson, Esq.
Charles William O'Brien, pro se
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Nelson E. Genshaft, Esq.
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